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No. 82-640

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF KANSAS, ex rel. PERRY MURRAY
and ROBERT T. STEPHAN,

Appellees,

vs.

HAROLD R. PALMGREN, et al.,

Appellants.

On Appeal From The Supreme Court Of Kansas

MOTION TO DISMISS

ROBERT T. STEPHAN
Kansas Attorney General

DAN BILES
Assistant Attorney
General
Kansas Judicial Center
Second Floor
Topeka, KS 66612
913/296-2215
(Counsel of Record)

STEVEN CARR
Special Assistant
KPL Tower
818 Kansas
Topeka, KS 66612
913/296-6300

PERRY MURRAY
County Attorney
Thomas County
P. O. Box 455
Colby, KS 67701
913/462-6171

Attorneys for Appellees

November 9, 1982

QUESTION PRESENTED

Does this appeal from the Supreme Court of the State of Kansas present a substantial federal question?

PARTIES TO THE PROCEEDINGS

APPELLEES ARE:

Robert T. Stephan
Attorney General of Kansas

Perry Murray
County Attorney of Thomas County, Kansas

APPELLANTS ARE:

Harold R. Palmgren
William J. Randall
John A. Renner
Samuel Friesen
Eugene J. Karlin
Lloyd E. Theimer
Harold E. Upchurch

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COMES NOW the appellee, the State of Kansas, ex rel., Perry Murray and Robert T. Stephan, by and through its counsel of record, Dan Biles, Assistant Attorney General, and moves this Court for an order of dismissal, pursuant to Supreme Court Rule 16.1(b). A dismissal of this appeal is justified in that this case fails to present a substantial federal question. As outlined below, appellee believes this appeal is not deserving of a large investment of this Court's time and, the claims of appellants are foreclosed by prior decisions of this Court.

WHEREFORE, appellee prays this Court dismiss this appeal.

STATEMENT OF FACTS

This appeal is a continuation of an action filed by the State of Kansas on relation of Perry Murray, Thomas County Attorney, and Robert T. Stephan, Attorney General, to recover civil penalties from the appellants for violations of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317, et seq. The appellants were all former elected county commissioners and appointed county hospital trustees of Thomas County. This case concerns three separate meetings among the appellants during November of 1979.

The trial court found all three meetings were prearranged, not open to the public, held for the purpose of discussing the business or affairs of the body and attended by a majority of a quorum, thus violating the KOMA. The county commissioners (appellants Harold R.

Palmgren, William J. Randall, and John A. Renner) and hospital trustee Samuel Friesen, were fined $10 each by the trial court for attending one meeting. Appellants Eugene J. Karlin, Harold E. Upchurch, and Lloyd E. Theimer, who were all hospital trustees, were fined $30 each for attending all three meetings. Costs were taxed to appellants. The Kansas Supreme Court affirmed.

This case arises out of an intense and bitter political controversy which raged in Thomas County for many years over the proposed construction of a new hospital. On two occasions the Kansas Supreme Court was the forum of disputes involving challenges to construction of a new, county-owned hospital. The court's decisions in Thomas County Taxpayers Ass'n. v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978) and Pratt v. Board of Thomas County Commissioners, 226 Kan. 333, 597

P.2d 664 (1979), effectively halted construction of a tax-supported hospital in this western Kansas community. Many of the appellants in this action were among the prime movers and litigants in both of those suits, including Lloyd Theimer, Harold Upchurch, and Samuel Friesen.

The new hospital proposal enjoyed overwhelming community support, as reflected in the results of two elections approving the proposal by wide margins, but nullified on other grounds by the above-cited decisions. Following the Pratt decision, a group of Thomas Countians formed a nonprofit corporation and launched a fund drive for the building of a private, nonprofit hospital in the county. By the Fall of 1979, several hundred thousand dollars were raised or pledged and the nonprofit hospital project was well underway. But, these appellants sought to thwart this latest effort

at building a new hospital in Thomas County.

In the Fall of 1979, they moved swiftly, sometimes secretly, in their official capacities as members of the Thomas County Board of County Commissioners (Commissioners) and the Thomas County Board of Hospital Trustees (Trustees), to try to sabotage the new hospital drive.

In a series of secret meetings of the two boards, the appellants gathered to discuss, and apparently to decide, their future course of official action as Trustees and Commissioners on two important and highly controversial items of county business concerning the "hospital issue." First, they sought to frustrate, if not defeat altogether, the construction of the nonprofit hospital by moving quickly to prepare a proposal and draw plans for remodeling the existing

county hospital in hopes of convincing state health officials of the lack of need for a new hospital in Thomas County. To this end, in mid-October, 1979, the Commissioners (appellants Harold Palmgren, William Randall, and John Renner) interviewed a number of architects in public meetings to discuss with them the drawing of plans and specifications for remodeling the existing hospital. (R., State's Exhibit 1.)

One of the architects interviewed, John Shaver of Salina, Kansas, met a second time with the Commissioners, and with three Trustees, appellants Theimer, Upchurch, and Eugene Karlin, on Saturday, November 3, 1979. However, this meeting was not public, and constitutes one of the violations of the Kansas Open Meetings law found by the lower courts. During this non-public meeting, the Commissioners and the three Trustees

gathered privately to discuss with Shaver his work on a preliminary energy audit and the possibility of obtaining federal funds for energy-related improvements to the Thomas County Hospital.

Each of the appellants was informed and understood he would be meeting with Shaver to discuss the architect's work and the possibility of getting an energy grant to make improvements to the existing hopsital. (R., Trial Transcript, pp. 94-100; 163-165; 286-291; 321-322; 340-344; 440-442; 483-484.) Commissioner Palmgren testified the Commissioners were "in the process of trying to hire an architect" and he attended the meeting in his official capacity to inform himself about Shaver and do his "homework" about county business. (R., Trial Transcript, p. 184.)

In a letter dated November 7, 1979, Shaver wrote the Commissioners in-

forming them he had notified the Kansas Energy Office the Commissioners were interested in obtaining federal energy funds for the Thomas County Hospital, Shaver had completed all of the energy audit forms, and Shaver was awaiting the Commissioners' "official" approval to make the energy grant application on their behalf. (R., State's Exhibit 6.) The minutes of the Board of County Commissioners, also dated November 7, 1979, reflect the decision of the Commissioners in a public meeting to authorize Shaver to proceed with a grant application on behalf of the County. The minutes indicate the vote was without any discussion by the Commissioners and that "the grant application has already been done" as of November 7, 1979. (R., State's Exhibit 1.) Later that month, the Commissioners voted to hire Shaver to prepare plans and specifications for remodeling the hospital.

(R., State's Exhibit 1.) Shaver's contract proposal was dated November 2, 1979. (R., State's Exhibit 5.)

The second important item of county business discussed in secret meetings of the Trustees pertained to management of the existing hospital. A corporation known as Hospital Affiliates International (HAI) was administering the hospital under a long-term management contract between HAI and the Trustees. The Trustees were unhappy with HAI, primarily because of HAI's public expressions of support for the nonprofit hospital effort, and HAI's previous endorsements of the earlier proposals for a new hospital. (R., State's Exhibit 2.) Appellant Trustees gathered privately on two occasions to discuss plans to terminate the HAI management and to seek a new administrator.

The appellant Trustees twice traveled in Karlin's automobile to Good-

land, Kansas, to meet with Bill Wilson, administrator of the Northwest Kansas Medical Center, the Goodland hospital. These meetings constitute the second and third violations of the Act found by the courts. During these meetings on November 23, 1979, and on or about November 30, 1979, the appellant Trustees Karlin, Theimer, Upchurch, and Friesen (Friesen attended the November 23 meeting only) discussed with Wilson their dissatisfaction with HAI. In addition, they inquired into Wilson's management policies, philosophies and experiences as a hospital administrator. They asked him if he would be interested in serving as administrator, or in providing management services, at the existing Thomas County Hospital. (R., Trial Tr., pp. 1350-368.)

Wilson expressed interest, but he told the Trustees he would not offer them a contract so long as HAI was pro-

viding services. (R., Trial Tr., pp. 537-539.) Nonetheless, the next day Wilson talked to the Goodland hospital board's attorney and asked him to draft a contract for providing management services to the Thomas County hospital board. (R., Trial Tr., pp. 504-505 and State's Exhibit 10.) Two days later, November 26, 1979, Wilson discussed the matter with his own board of trustees in a special meeting called for that purpose. The Goodland board of trustees voted unanimously to authorize Wilson to enter into a ninety-day management contract with the Thomas County Hospital board during this meeting. (R., Trial Tr., pp. 544-548, and Defendants' Exhibit 8.)

The next day, November 27, in an open public meeting of the Thomas County Board of Trustees, the Board voted unanimously to rescind the HAI management contract, without discussion among the

board members. (R., State's Exhibit 2.) On November 29, 1979, the Goodland board's attorney completed a management contract and submitted it to Wilson. (R., Trial Tr., pp. 1504-509.)

On or about November 30, 1979, the appellant Trustees Karlin, Theimer, and Upchurch, returned to Goodland to meet with Wilson where, once again, the topic of discussion between them was the possibility of Wilson serving as administrator, or providing management services, now that HAI's contract was terminated. (R., Trial Tr., pp. 1350-368.) At about this same time, one of the Trustees asked Wilson to present his contract proposal to the full board. (R., Trial Tr., pp. 554-555.)

Appellant Karlin, who was chairman of the Board of Trustees at this time, testified unequivocally that the Trustees in attendance discussed with

Wilson, and among themselves, their dissatisfaction with HAI, and they inquired of Wilson if he would be interested in administering the Thomas County Hospital. (R., Trial Tr., pp. 1355-359, 361, 365, 368.) As Karlin simply stated it, "We were looking for an administrator." (R., Trial Tr., p. 359.)

Karlin further testified the Goodland meetings were prearranged and on both occasions the Trustees traveled together in Karlin's automobile. And, despite appellants' contentions that they made no effort to hide the fact they were gathering together on all of these occasions in "public" places, the weight of the evidence contradicts them. They failed to notify the then-chairman of the Trustees, David Jennings, and three other Trustees about the meeting on November 3 with Shaver, and, according to one witness, they met behind closed doors. (R.,

Trial Tr., pp. 151-152.) The Goodland meetings took place in a private conference room and in Wilson's private office. (R., Trial Tr., pp. 356, 361.) It was undisputed that none of the appellants gave any notice of any of these meetings to the Colby Free Press, the local newspaper, which was customarily notified of all meetings of both boards. (R., Trial Tr., pp. 33-34; 57-59.) And, though the Trustees had, prior to November 23, 1979, received numerous letters from citizens specifically requesting notice of all regular and special meetings of the Board of Trustees (R., State's Exhibit 4), it was conceded no notice was given of the two Goodland meetings. Several of the letters requesting notice of meetings made express reference to the Kansas Open Meetings Act. (R., State's Exhibit 4.)

ARGUMENT

Applied to the specifics of this case, appellants are contending they, as a group, have a First Amendment right to secretly interview an architect or a hospital administrator for jobs to be financed by public funds; and to secretly review a proposed energy grant which also would be publicly funded. This argument ignores that appellants, as a group, were meeting in their official capacities and taking care of "county business" by promoting energy grants and searching for new administrators. All of this was being done secretly to further one side of a very controversial public issue in the community--construction of a new county hospital or preservation of the existing facility.

It must be emphasized that above all, the "county business" is the public's business. By actively seeking

election to the Commission or appointment to the hospital board, appellants freely assumed whatever limitations co-exist with the honor of serving as the public's representatives. The Commissioners and Trustees were not required to run for office. They should not now be heard to complain about its restrictions. A common sense reading of the KOMA, however, reveals that the "open meeting" provision does not prohibit informal association. A plain reading of the statute, however, does reveal that appellants were not permitted, as they did here, to secretly congregate for the purpose of interviewing architects and administrators for publicly-supported employment, or to secretly review and launch applications for publicly-sponsored energy grants.

Of greater bearing on the constitutional rights of speech and association is the well-settled principle that

time, place, and manner restrictions on speech and association are valid and proper when in the public interest. As this Court stated in Grayned v. City of Rockford, 408 U.S. 104 (1972):

> Clearly, government has no power to restrict (expression) because of its message. Our cases make equally clear, however, that reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, and are permitted. Id., at 115. (Citations omitted.)

In the case now before this Court, the KOMA does not in any way prohibit the discussion and deliberation of public business by appellants. It does direct that public business be discussed at a time, place, and manner in which the public may attend. Thus, while the KOMA does regulate in the public interest the time, place, and manner in which public officials, serving in their official capacities, discuss public business, it

does not violate their rights of speech or association.

Appellee is aware of only one other appellate decision concerning a litigant's constitutional attack of an "open meetings" law on First Amendment grounds. In Dorrier v. Dark, 537 S.W.2d 888 (1976), the Supreme Court of Tennessee dismissed this constitutional attack, just as the Kansas Supreme Court did in the action now on appeal. There, the Tennessee court said:

> The only legitimate "chilling effect upon free expression" (appellant's phrase) that a member of a covered body could entertain is that deliberation in open meeting of a particular matter would be detrimental to the public interest. The people, speaking through the Legislature, have determined that they are willing to assume those detriments to secure the benefits of open government as prescribed in the Act. We are not impressed by the argument that a citizen-member of a governing body suffers an infringement of his right to free speech by the requirement that any deliberation toward an official decision must be conducted openly. Id., at 892.

As to appellants' argument that the KOMA is unconstitutionally vague and overbroad, appellee will simply refer this Court to the decision of the Kansas Supreme Court which directly addresses the issue. As to this, however, it should be pointed out that appellants frequently make use of imaginative hypotheticals aimed at creating an absurd effect in focusing ridicule on this open meetings statute. As this Court said in Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937):

> Constitutional questions are not to be decided hypothetically. Id., at 353.

Besides tending to confuse the issues, hypotheticals are further frowned upon by the Court as a mode of asserting the vagueness of a statute, because "it will always be true that the fertile, legal imagination can conjure up hypothetical cases in which the meaning of disputed terms will be a nice question." Grayned

v. City of Rockford, supra, at 110, n. 15.

This Court, however, should not be sidetracked, since the facts of this particular case are central to the decision now being appealed. Both Kansas courts have not hesitated in concluding that appellants knowingly held three secret, prearranged meetings for the purpose of discussing "county business." Appellants violated the Act and are subject to its penalties.

As to appellants' final contention that the court below erred in refusing to permit them to present their defense of prosecutorial discrimination, this Court again is referred to the meticulous attention paid to this argument by the Kansas Supreme Court.

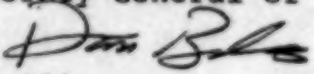
CONCLUSION

This appeal does not present this Court with a substantial federal

question. The prior decisions of this Court adequately address the issues presented. Appellants, in their official capacities as elected and appointed county officials, met secretly to advance one side of a very controversial community issue. Their actions properly were found to be in violation of the Kansas Open Meetings Act.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas



Dan Biles
Assistant Attorney General
of Kansas
Kansas Judicial Center,
Second Floor
Topeka, Kansas, 666]2
913/296-2215

Steven Carr
KPL Tower
818 Kansas Avenue
Topeka, Kansas, 66612
913/296-6300

Perry Murray
Thomas County Attorney
Thomas County Courthouse
Colby, Kansas, 67701
913/462-6171

Counsel for Appellee

PROOF OF SERVICE

The undersigned, DAN BILES, a member of the Bar of this Court and counsel of record for Appellee herein, hereby certifies that on the 9th day of November, 1982, he caused to be served foregoing Motion to Dismiss on Appellants in this appeal, by mailing three (3) copies thereof by ordinary mail, first class postage prepaid, addressed to their attorney, as follows:

ALLEN SHELTON
323 North Pomeroy
Hill City, Kansas, 67642

Attorney for Appellants